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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FREDRICK BLUM and CHICAGO TITLE AND TRUST COMPANY, etc.,

Appellants,

v.

EDWARD J. ROSEWELL, COUNTY TREASURER AND EX-OFFICIO COUNTY COLLECTOR OF COOK COUNTY, ILLINOIS, etc.,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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October Term, 1983

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Appellee.

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The Appellee, Edward J. Rosewell, County Treasurer and *ex-officio* County Collector of Cook County, Illinois (hereinafter "the Collector") moves the court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of Illinois on the grounds that it is manifest that the judgment is entirely correct so that the annual tax sale, which generates much needed tax revenues for all Cook County taxing bodies, may proceed without further delay.

FACTS

The facts of this case are discussed in the Illinois Supreme Court opinion. 99 Ill. 2d at 409. A brief summarization is made here for the Court's convenience.

On November 4, 1983 the Cook County Collector, pursuant to Section 235 of the Illinois Revenue Act (Ill. Rev. Stat. ch. 120, para. 716) filed an application in the Circuit Court of Cook County seeking an order of judgment and sale against approximately 121,000 parcels of real estate which have been returned delinquent for the nonpayment of 1982 real estate taxes. (C1)

Chicago Title and Trust Company, as trust deed holder for a mortgagee (hereinafter CT&T) timely filed an objection to the application on the grounds that Sections 225 and 230 of the Illinois Revenue Act (Ill. Rev. Stat. ch. 120, paras. 706 and 711) violated the due process clause in that there was no provision which required the Collector to mail notice of his application to any party interested in the real estate other than the owner/assessee.* The objection was predicated on the theory that the case of *Mennonite Board of Missions v. Adams*, ... U.S. ....., 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), was applicable to the Illinois Revenue Act such that mailed notice of the application should have been sent to mortgagees, mechanic's lien claimants and other parties interested in the real estate. (C29-C45)

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* Under Illinois law, the assessee, as listed on the Collector's tax books, is presumptively the owner of the property. See Section 275 of the Revenue Act (Ill. Rev. Stat. ch. 120, para. 756).

Fredrick Blum, an alleged taxpayer, whose property was *not* involved in the application (hereinafter "Blum" or collectively with CT&T referred to as "Objector") also filed an objection to the application contending that the application was unconstitutional for essentially the same reasons alleged by CT&T.

The Collector filed a motion to dismiss both objections on the grounds that Sections 225 and 230 of the Revenue Act were consistent with *Mennonite* and were constitutional. The motion to dismiss also questioned the standing of either party to raise the objections.

The trial court granted the motion to dismiss and sustained the constitutionality of the notice requirements attending the Collector's application. (C62, C63) Appeal was timely taken from this order. On November 18, 1983 the trial court also entered an order permitting the Collector to offer the tax delinquent parcels for sale. The Illinois Supreme Court granted the Objector's motion for direct appeal pursuant to Rule 302(b) and stayed the enforcement of the order permitting the sale to commence.* On January 20, 1984 the Illinois Supreme Court sustained the finding that the Illinois tax collection system was constitutional. 99 Ill. 2d 407 (1984).

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* Objectors suggest only a "limited" right of appeal is provided under the Illinois Revenue Act by Section 238 (Ill. Rev. Stat. ch. 120, para. 719). Section 238 involves instances where the objection to the application does not involve attacks upon the merits of the tax. Parties wishing to raise claims regarding the correctness of the tax may do so under the specific objection procedure. *See Rosewell v. La Salle National Bank*, 450 U.S. 503 (1981). CT&T did not, as required by Section 238 post payment of the taxes but did obtain a stay of the entire sale. Thus, this appeal does not seem to be "limited."

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED BECAUSE THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The issue raised in this case by Objectors is whether parties, other than the owner/assessee, who have an interest in tax delinquent real estate, are entitled to notice by mail of the application in the Circuit Court of Cook County for judgment and order of sale against the property. The Objector's claim that the Illinois Supreme Court ignored this Court's holding in *Mennonite Board of Missions v. Adams*, ... U.S. ....., 103 S.Ct. 2706 (1983). Objector contends that the tax sale procedures of Indiana, which were involved in *Mennonite*, are similar to the Illinois tax sale system. Objector, therefore, concludes the Illinois procedures are unconstitutional.

An analysis of the Illinois tax sale procedures, the facts involved in *Mennonite* relative to the Indiana procedures, and the applicable rule of law regarding due process will disclose the complete lack of substance in Objector's case.

A. The Illinois Tax Collection System Is Constitutional Because It Provides For The Service Of Notice Which Is Reasonably Calculated Under All The Circumstances To Apprise Parties Of Proceedings Which Will Adversely Affect Their Interests And Rights.

The governing principle of law applicable to this case was most recently pronounced in the case of *Mennonite Board of Missions v. Adams*, ... U.S. ....., 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). This Court used the following language:

> ". . . *notice is a minimum constitutional precondition to a proceeding which will adversely affect* the liberty or property interests of *any* party whether unlettered or well versed in commercial practice if its name and address are reasonably ascertainable. (emphasis added).
>
> 77 L.Ed.2d at 188.

The notice that is to be afforded is one "which is reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

In order to be entitled to mailed notice as a matter of due process under *Mennonite* and *Mullane*, CT&T must show that the Cook County Collector's Application is a proceeding which adversely affects its interests. Analysis of the Illinois application proceeding demonstrates that it is not such a proceeding.

The Illinois Supreme Court correctly observed the fundamental and material differentiations between the Illinois application proceeding and the Indiana sale proceedings which were found constitutionally defective. 99 Ill. 2d at 414-415. The differences are: (a) the Indiana sale is a non-judicial foreclosure proceeding because it is the only step preceding the issuance of a tax deed, (b) the Indiana property may be sold for an amount which exceeds the existing tax lien, and (c) the Indiana sale is a lien against the land for the amount paid. Ind. Code. 6-1.1-24-9. In Illinois, the application and sale is not the proceeding which divests one of title or interest. The Illinois application limits the sale to the amount of the tax lien so that the lien for taxes is merely shifted from the

county to the tax buyer. The Illinois lien for taxes is not and may not be increased as a result of a sale.*

Mennonite correctly observed the clearly adverse impact of a sale in Indiana. The Indiana sale procedure in essence is a tax deed proceeding which permits a new tax lien to be placed against the property which is superior to all others. *Mennonite* emphasized the immediate impact of a sale in Indiana as follows:

> "A mortgagee's security interest generally has priority over subsequent claims or liens attaching to the property . . . (t)*he tax sale immediately and drastically diminishes the value of this security interest by granting the tax sale purchaser a lien with*

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* The following example is illustrative. A property which is located in Indiana may be delinquent in the principal amount of $1,000 in taxes plus interest. As a direct result of the Indiana sale, the lien may be increased in principal amount to $10,000 if that is the amount bid. The adverse impact on the Indiana mortgagee is patent. The mortgage is no longer junior to a $1,000 tax lien but is now junior to a $10,000 tax lien. So viewed, the tax purchaser is placed in a position even superior to that of the County before the sale. If the mortgagee in Indiana is not advised of the sale proceeding, its interests may be made subservient to an increased tax lien.

By contrast in Illinois, the sale is limited to the $1,000 deficiency plus interest. Section 245 of the Revenue Act (Ill. Rev. Stat. ch. 120, para. 726). There is a $1,000 tax lien in principal amount existent both before and after the sale. There is no adverse effect on the interest of the Illinois mortgagee. Moreover, the Indiana sale is the first and only step, with the exception of the passage of time, which precedes the issuance of a tax deed and the divestiture of all interests in the delinquent property.

The Illinois application may, of course, affect the interests of the owner/assessee since that party may lose the right to file a specific objection to contest the substantial justice of the tax if the taxes are not paid under protest and an objection to the application filed. The owner/assessee is of course notified and CT&T makes no issue here on this point.

> *priority* over that of all other creditors. Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest since purchaser acquires title . . . at the conclusion of the redemption period." (emphasis added).
>
> 77 L.Ed.2d at 187.

None of the foregoing considerations are presented by the Collector's application. Any claim the Illinois tax buyer may have is equivalent to the tax lien. It is not a new claim, as in Indiana, subsequent in time yet superior to the mortgagee. The Illinois tax buyer will not automatically acquire title at the end of the redemption period. Viewed in this light, the application does not immediately and drastically diminish the value of the security interest. Case law supports this conclusion. In *Smith v. D.R.G. Inc.*, 30 Ill. App. 3d 162, 166 (1st Dist. 1975), *reversed on other grounds*, 63 Ill. 2d 31 (1976), the appellate court used the following language to describe the limited scope of the application:

> "the judgment entered on application of the county collector conclusively determined that there was an assessment of the property, that the assessment was legal, that the assessment was correctly computed, and the collector had the power to satisfy the assessment by public sale. (citation omitted). *Neither the collector's application nor the judgment entered thereon, however, touched in any way on the ownership rights of parties interested in the subject real estate.*" (emphasis added).

The Objector's only attempt to rebut this proposition is that as a result of the sale, one must pay the tax plus a possible maximum penalty of 18% which may increase

at six month intervals* for two years. The Illinois Supreme Court correctly observed that this is fair and reasonable when one considers that the mortgagee has neglected to ensure the mortgagor has paid the taxes when due. Moreover, imposition of the interest does not drastically reduce the security interest of the mortgagor. Indeed, interest is imposed on delinquent federal income taxes without mailed notice and this does not offend due process. 99 Ill. 2d at 412-413.

Moreover, the certificate of sale in Illinois does not constitute a vested real property interest in the real estate. *See City of Chicago v. City Realty*, 127 Ill. App. 2d 185 (1st Dist. 1970). Indeed, if the tax buyer fails to perfect entitlement to a deed, the certificate is void and no ownership rights are affected. Section 271 of the Revenue Act (Ill. Rev. Stat. ch. 120, para. 752). *See also First National Bank of Waukegan v. Kusper*, 98 Ill. 2d 226 (1983).

The Illinois Supreme Court also correctly observed that the notice provisions attendant to the application were reasonable under the circumstances. 99 Ill. 2d at 412. The circumstances in this case are that the only way the County may ascertain the identity and whereabouts of occupants, mortgagees and other parties interested in the real estate is through a paper mountain consisting of 121,000 title searches. This is a costly and time consuming process.**

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* Tax buyers must send a certified mailed notice through the clerk's office within six (6) months of the sale which advises the owner/assessee of the sale and the amount necessary to redeem. *See* Section 241(a) of the Revenue Act (Ill. Rev. Stat. ch. 120, para. 722(a)).

** The Collector estimates the cost of obtaining 121,000 title searches from a title company to be $5,000,000. This does not include the cost of having employees examining the results of the search and deciding who is to be notified.

Consequently, under no circumstance does the Collector's application adversely affect a mortgagee's interest or immediately and drastically diminish the value of the mortgagee's claim. Mailed notice of the application to a mortgagee is not constitutionally required and the notice which is provided is reasonable.

B. The Only Proceeding Which Adversely Affects A Mortgagee's Interest In Illinois Is The Tax Deed Proceeding.

The Illinois proceeding which may adversely affect a mortgagee's interest is the *tax deed* proceeding. The tax deed proceeding is the proceeding in which the interest of all parties in the real estate may be eliminated. *See*, Section 266 of the Revenue Act (Ill. Rev. Stat. ch. 120, para. 747). In contrast, the Indiana tax sale proceeding not only affects the mortgagee's interest by virtue of the potential increase in the principal amount of the tax lien, but also it adversely affects parties interested because no additional proceedings need be instituted to effect a tax title. The Indiana buyer need only await the passage of time in order to be entitled to a deed. In fact, a deed may issue even if the tax buyer has lost the certificate. Ind. Code. Sec. 6-1.1-25-4. Thus, the Indiana tax sale proceeding really constitutes both a proceeding whereby the tax lien may be increased and a proceeding which results in the issuance of a deed. In Illinois, this is simply not the case.

The constitutional adequacy of the Illinois tax deed procedure has been confirmed in the cases of *Catoor v. Blair*, 358 F. Supp. 815, *affirmed* 414 U.S. 990 (1973) and *Balthazar v. Mari, Ltd.*, 301 F. Supp. 103, *affirmed mem.* 396 U.S. 114 (1969). In both those cases, the notice requirements imposed on a tax buyer were challenged as insufficient. The challenges in both cases were rejected.

Both *Balthazar* and *Catoor* stand for the proposition that the many notice requirements attending to the tax deed proceeding are constitutionally adequate. The notices, served by the sheriff and by certified mail and by three publications, are reasonably calculated to advise interested parties of proceedings which may adversely affect their interests.

Based on the foregoing it is clear that the Illinois Supreme Court's decision is a correct application of *Mennonite* and *Mullane*. There is no substantial question presented in this appeal so that the appeal should be dismissed or summarily affirmed as abundantly correct.

II.

THE APPEAL SHOULD BE DISMISSED BECAUSE OBJECTORS HAVE FAILED TO ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THAT THEY HAVE STANDING TO RAISE THE CLAIMS PRESENTED OR TO ESTABLISH THAT A CASE OR CONTROVERSY EXISTS.

A. Objector Blum Lacks Standing As A Taxpayer To Object To The Collector's Annual Application.

The Illinois Supreme Court did not reach the issue of standing raised by the Collector. Consideration of the point demonstrates the appeal should be dismissed.

Objector Blum did not show and did not allege a personal stake in the outcome of the present controversy. His property is not included in the proposed annual tax sale and he has failed to show that he would sustain direct financial injury if the tax sale were to proceed as required by statute. Consequently, Objector Blum lacks standing

in this case. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Flast v. Cohen*, 392 U.S. 83 (1968).*

B. The Objectors Have Failed To Comply With The Jurisdictional Requirements Necessary To Object To The Collector's Annual Application For Judgment And Order Of Sale.

In order to object to the Collector's application, the taxes levied must be paid in full and under protest. Sections 194 and 235 of the Illinois Revenue Act of 1939 (Ill. Rev. Stat. ch. 120, paras. 675 and 716). *Clarendon Associates v. Korzen*, 56 Ill. 2d 101 (1973); *In re Edward J. Rosewell v. Randolph-Wells Building Corporation*, 78 Ill. App. 3d 769 (1st Dist. 1979).

In the present case, neither objection shows compliance with the mandatory jurisdictional requirements of these provisions of Illinois law. In addition, CT&T has failed to pay the taxes in question as a predicate to perfecting an appeal according to Section 238 of the Revenue Act. As a consequence, the appeal is properly dismissed on these grounds.

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* The Blum objection was purportedly brought pursuant to 42 U.S.C. Sec. 1983. Since Objector Blum did not contend that the tax sale would violate his constitutional rights, his objection is also properly dismissed for failure to present a case or controversy. *United States v. Fruehauf*, 365 U.S. 146 (1961); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

CONCLUSION

The decision rendered by the Illinois Supreme Court in this case is consistent with precedent well established both in Illinois and by this Court. No substantial or significant question is presented. Either the appeal should be dismissed or the decision of the Illinois Supreme Court should be summarily affirmed.

Respectfully submitted,

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